



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 33 OF 2016

A TO Z INFRASTRUCTURE LIMITEDAPPLICANT

VERSUS

BANKING FRAUD INVESTIGATION UNIT1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT, MILIMANI2ND RESPONDENT

RULING

1. The Notice of Motion Application dated 16th November, 2016 filed by the Applicant seeks the following orders;

- a. **THAT** the application be certified urgent and be heard exparte in the first instance.
- b. **THAT** the record of proceedings in the Nairobi Chief Magistrate's Court, Milimani Miscellaneous Criminal Application 225 of 2016 Banking Fraud Investigation Unit –vs- Equatorial Commercial Bank, Head Office & 3 Others be called for and examined by this Honourable Court for the purpose of satisfying itself as to the correctness, legality and/or propriety of the orders issued to freeze the Applicant's Account No. 0403993601 at Equatorial Commercial Bank Limited (now known as Spire Bank).
- c. **THAT** the funds preservation orders issued in Miscellaneous Criminal Application 225 of 2016 Banking Fraud Investigation Unit –vs- Equatorial Commercial Bank, head office and 3 Others freezing the Applicant's bank Account No. 0403993601 at Equatorial Commercial Bank Limited (now known as Spire Bank Limited) be lifted or stayed pending the hearing and determination of this Application.
- d. **THAT** the funds preservation orders issued in Miscellaneous Criminal Application 225 of 2016 Banking Fraud Investigation Unit –vs- Equatorial Commercial Bank, head office and 3 Others freezing the Applicant's bank Account No. 0403993601 at Equatorial Commercial Bank Limited (now known as Spire Bank Limited) be quashed.
- e. **THAT** the costs of this application be awarded to the Applicant.

2. The application is premised on the grounds on its face and the supporting affidavit of **Akif Hamid Butt** the Director of the Applicant company. It was sworn on 16th November, 2016.

3. He averred that the Applicant is the registered proprietor of a property known as land reference No. 3734/269 located at Chalbi drive in Lavington. The company was formed as a joint venture for the specific purpose of purchasing and developing the property. It undertook to develop the property known as **Penta Villas** consisting of high end villas, which are now fully built and up for sale.

4. The company's account is No. 0403993601 at Equatorial Commercial Bank (Spire Bank Ltd.). It is this account which has to receive the proceeds of the sale of the aforesaid villas. He explained that Mahan Limited is the developer of this property and it used a loan facility from K-rep Bank Ltd. (Now Sidian Bank) to carry out the construction.

5. One of the villas was sold to **Sarah Cholloh Marial Benjamin** at shs.85,000,000/= to be paid in three instalments. The first two instalments were paid leaving a balance of shs.28,500,000/= equivalent to 264,000 USD. This money was paid into the said account by the Applicant's conveyancing advocates M/s Ogola & Mujera Advocates.

6. That on 28th January, 2016 the 1st Respondent filed an exparte application at the CM's Court Milimani vide Miscellaneous Criminal Application No. 225 of 2016 Banking Fraud Investigation Unit. The 1st Respondent sought and was granted an order to investigate the aforesaid account and also freeze it.

7. He further contended that he was never served with the application filed nor the orders issued in the Magistrate's Court. He only learnt of the happenings when he was denied access to his bank account which remains frozen to date. He denied being under investigation by any agency. He therefore asks the Court to review the Orders and set them aside/quash them.

8. The application was opposed by way of grounds of opposition dated 30th November, 2016 as follows;

i. The affidavit of CPL Saulet Jeremiah Matipei sworn on 28th January, 2016 in support of the application for freezing orders demonstrated a reasonable suspicion that funds deposited in the account of Ogola & Co. Advocates was suspected to be part of Kshs.800,000,000/= stolen from National Youth Service.

ii. The said affidavit disclosed that there was an attempt on 14th December, 2015 to transfer the said funds to a foreign country.

iii. That it was therefore necessary for the court to issue funds preservation orders of Kshs.27,500,000/= which was issued on 28th January, 2016.

iv. That investigation into transfer of the said funds which has taken international dimensions because of mutual legal assistance request is incomplete and it is only fair that the preservation orders be maintained pending completion of investigations.

v. That the applicant does not disclose the illegality, irregularity or unlawfulness of the order issued by the Magistrate on 28th January, 2016.

vi. That in any event, the applicant ought to have moved the Magistrate's Court to vary or set aside the exparte order if it was aggrieved.

9. Mr. Odera for the Applicant submitted that the Applicant's averments were not contested as there was no replying affidavit filed. Further that the Magistrate's Court had no power to issue the kind of orders it issued. Such orders could only be granted under Section 80 of the Evidence Act in respect of investigations, only and not freezing an account. That freezing orders can only be issued under Section 8 and 9 of Proceeds of Crime and Money Laundering Act (POCAMLA). He referred the Court to ACEC Misc. Application No. 20, 21 and 22 of 2016 where Justice Achode had quashed freezing orders in a similar matter.

10. **Mr. Ashimosi** for the Director of Public Prosecution opposed the application saying the application having been made under Section 362 CPC and Article 165 (6) and (7) did not require an elaborate application and affidavits. He submitted that the Applicant needed to show that there was an illegality, irregularity and unlawfulness but he had only tendered evidence to show his innocence. He referred the Court to the case of ***Mape Building and General Engineering –vs- A.G. & 3 Others Nairobi Petition No. 437 of 2015***, and submitted that there was reasonable suspicion as there was a proper trail of the money and investigations were not complete.

11. He further stated that in the Application before Justice Achode, the Order to unfreeze was given because the Asset Recovery Agency had said it had no interest in the funds and that was not the case in this one.

12. In response, Mr. Odera submitted on how the orders by the Magistrate's Court were so open ended with no return date. Further, that there had been no grounds for the grant of the orders which they seek to set aside.

13. This application seeks the revisionary powers of this Court over the subordinate court with regards to the preservation orders made pertaining to account No. 0403993601 at Equatorial Commercial Bank now known as Spire Bank.

14. The power to revise a decision of the subordinate court by the High Court is donated by Section 362 of the CPC which the applicant has invoked through this Notice of Motion seeking to have the Court reverse the orders of the Magistrate's court delivered on the 28th January, 2016. Section 364 CPC on the other hand provides for powers of the High Court in the exercise of its revisionary jurisdiction. This Court is also given supervisory powers under Article 165 (6) and (7) of the Constitution over the subordinate court.

Article 165 (7) provides;

“For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

15. This Court therefore has powers to call for any proceedings before a subordinate court and give directions or orders as it may consider appropriate for fair administration of justice. Further, Section 362 CPC provides;

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

16. Pursuant to the above provisions, this Court has called for the lower court record together with the proceedings to determine the regularity or otherwise of the proceedings. I have perused the said record in detail and find that the application before that court and the orders issued thereto have not been served on the Applicant to date.

Section 118 CPC provides;

“Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in

the warrant) for that thing and, if the thing be found, to seize it and take it before the court having jurisdiction to be dealt with according to law.”

Section 118 CPC is read with Section 121 (1) CPC which provides as follows;

“(1) When anything is so seized and brought before the court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.”

17. Further, Section 180 of the Evidence Act provides;

“Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker’s book is necessary or desirable of the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account or any specified person in any banker’s book, and such warrant shall be sufficient authority for the production of any such banker’s book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker’s book.”

It was Mr. Odera’s argument that an order freezing an account can only be made under Section 8 and 9 of Proceeds of Crime and Money Laundering Act (POCAMLA), implying that the magistrates Order to freeze the account in issue was therefore an illegal order. He however, appreciates that the subordinate court has the power to investigate accounts under Section 180 of the Evidence Act.

18. Section 118 CPC together with Section 121 (1) CPC gives power for investigation. Under the former provision, there is power to seize and under the latter, the seized thing is brought before the court. Is money in a bank account one of such things that can be seized? What would happen if upon investigation it is found that money in a certain account was suspiciously held? How can the investigator ensure that such money is preserved and does not leave the account before investigations are complete? Should the investigator file another application in the High Court under POCAMLA as per Mr. Odera’s submissions? These are some of the many questions that crossed my mind as I considered this application.

19. The Court of Appeal had an opportunity to deal with a similar scenario in the case of ***Samuel Watatua & Another –vs- Republic, Court of Appeal, Nairobi, Criminal Appeal No. 2 of 2013*** (unreported) where the court said thus;

“A reading of Section 180 of the Evidence Act together with Sections 118 and 121 of the CPC leaves no doubt in anybody’s mind that the court, upon application has power not only to authorize access by police to bank accounts of suspected criminals but also to freeze those accounts for the purposes of preserving evidence and the subject matter of the alleged crime.”

and further,

“In this case, we find that the limitations in Section 180 of the Evidence Act together with Sections 118 and 121 of the CPC are in consonance with Article 24 of the Constitution.”

20. I am duly guided by this finding by the Court of Appeal that the lower court had jurisdiction to issue the order of inspection and freezing of the subject bank account. The ruling by Justice Achode in ACEC Misc. Nos. 20, 21 and 22 of 2016 referred to me made a similar finding.

My finding therefore is that the lower court had jurisdiction to issue the order for investigating and freezing the account.

21. The real issue in contention is that there has been no return date on the preservation of funds which was granted on the 28th January, 2016.

Further, that it was incumbent upon the Court to ensure that it maintained an oversight role over the process.

22. Provisions of Section 118, Section 121 CPC and Section 180 Evidence Act allow the party applying to do so *ex parte*. There is no return date nor limited existence of the said order, nor even provision for challenging of the *ex parte* order through an *inter partes* hearing in any of the above provisions.

It's therefore clear that the parties adversely affected by such orders remain at the mercy of the investigator.

23. Article 50 of the Constitution provides for the right to be heard. in the case of ***Samuel Watatua & Another (supra)*** the Court of Appeal further said;

“In certain cases as stated in the Kibiti case (supra) where properties or monies in bank accounts may be dissipated before the matter is heard inter partes, ex parte orders may be granted but only for a short period. Thereafter, the application should be served upon all persons likely to be affected by any ensuing orders and no final orders should be made until the matter is heard inter partes with all parties, pursuant to Article 50 of the Constitution, being accorded an opportunity to be heard.”

24. In order to keep the process fair, just and in line with Article 50 of the Constitution, the Magistrate's Court moved under Sections 118 and 121 of the CPC and Section 180 of the Evidence Act should upon granting the *ex parte* orders issue the following directions;

- i. Order that the Respondent be served with the Application and Order issued, for necessary action if any.
- ii. Give a return date for a progress report.
- iii. Indicate the period when the orders issued will remain in force.

25. From the foregoing, it is clear that neither the lower court nor this Court knows the exact position of the investigations. What is however, clear is that the account remains frozen with the suspect sum of USD264,000/= intact. This is unlike the scenario in ACEC Misc. Application Nos. 20, 21 and 22 of 2016 where the subject account was only used as a transit account. The suspect sum was not in that account and the Asset Recovery Agency had come out clearly to indicate that it had no more interest in the money. This case and the other three cases (consolidated) present totally different circumstances.

It therefore follows that each case should be assessed on its own peculiar circumstances.

26. The orders complained of were issued on the 28th January, 2016 by the lower court. It is almost eleven (11) months since the issuance of the said orders. This is a matter that is in public interest and this Court has taken that into account

27. I decline to unfreeze the account as prayed by the Applicant and dismiss the application dated 16th November, 2016.

I give the following directions;

- i. The 1st Respondent to serve the Applicant with the application dated 28th January, 2016 plus the orders issued by the lower court within two (2) days of this Ruling.
- ii. The Applicant at liberty to challenge the said orders before that court within seven (7) days of being served.

iii. The 1st Respondent to have a right to file a reply (if any) within three (3) days of service.

iv. The parties to appear before the trial court (Mr. Nzakyo) on 11th January, 2017 for hearing and or further orders.

There shall be no order as to costs.

Date and delivered this 21st day of *December* 2016 at **NAIROBI**

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE